No. WD81759

In the
Missouri Court of Appeals
Western District

STATE OF MISSOURI,

Respondent,

v.

PATRICIA ANN PREWITT,

Appellant.

Appeal from the Pettis County Circuit Court
18th Judicial Circuit
The Honorable Robert L. Koffman, Judge

RESPONDENT'S BRIEF

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STATEMENT OF FACTS

Appellant was charged by information on April 9, 1984, with capital murder, §565.001, RSMo 1978 (repealed effective 10-1-1984). Pursuant to a request for a change of venue, the case was transferred from Johnson County to Pettis County. The cause went to trial before a jury on April 16-19, 1985, in the Pettis County Circuit Court, the Honorable Donald Barnes presiding.

Viewed in the light most favorable to the verdict, the evidence adduced at trial showed the following. In the early morning hours of February 18, 1984, Clifford Guston and Chief John Scott entered the home of William Prewitt, the victim (Tr. 165, 171). When the two men entered the home, they discovered the deceased body of William Prewitt (Tr. 165, 174). The victim was fatally injured by two shots to the head (Tr. 356-69, 457-80). The wound to the right temple would not have caused immediate death (Tr. 468-469). The second wound, severing the brain from the brain stem, would have caused instantaneous death (Tr. 470-71). Given the nature of the crime scene, it was apparent that the temple wound would have been inflicted before the rear head wound (Tr. 472).

There were many factors that linked appellant to the crime. Chief John Scott observed only one set of tire tracks near the Prewitt home (Tr. 171). These tracks were apparently made when appellant took herself and her children to the home of her neighbor, Clifford Guston (Tr. 161-65). There were no other tire tracks approaching the victim's home (Tr. 170-71). The victim was shot in his

sleep (TR. 471). These facts are consistent with the theory that no one approached the home to shoot the victim.

The gun that fired the shots that killed the victim was the family gun and was located in the bedroom (Tr. 287-88). After murdering her husband, appellant apparently tried to hide the gun in the farm pond (Tr. 220, 392). Her footprints were found near the gun. One footprint was located on the bank of the pond, and one was located in the pond itself (Tr. 392). These footprints were identified as coming from a pair of red boots owned by appellant (Tr. 204-06, 207-10). Following the murder, appellant attempted to remove the boots from the house (Tr. 182-86). A deputy charged with securing the house prevented this from happening (Tr. 182-86).

Appellant was the beneficiary of two life insurance policies on the life of the victim. The proceeds of one policy were worth $49,983.31 and the other was worth $43,488.78 (Tr. 396-409). Appellant had had sexual affairs with at least three other men (Tr. 414-17, 420-24, 431-39). She had either discussed or plotted with each of her paramours the death of her husband (Tr. 436-37). She had offered one of the men $10,000 of insurance money if he would kill her husband (Tr. 436-37). Appellant offered her insurance money to another paramour to prompt him to kill her husband (Tr. 423-24).

Following the murder, appellant was interviewed several times by the police (Tr. 276-300). Her story changed from interview to interview (Tr. 293).

She stated that an intruder fired the two shots into her husband (Tr. 277). During each interview, appellant said that when she left the house to get help, the victim was bleeding (Tr. 294-95). If this were true, only the temple would could have been inflicted (Tr. 457-80). Appellant did not explain how the fatal wound occurred.

During the interview on February 20, petitioner was asked about her extramarital affairs (Tr. 295). She said she had none (Tr. 296). When told that some men had stated that she had had sex with them, she denied it again (Tr. 296). When asked who those men were (Tr. 296), appellant continued to play cat-and-mouse with Officer Hughes (Tr 296-99). With the mention of each individual extramarital affair, she would initially deny it, but then finally admit it (Tr. 296-299). With her affair with John Hancock, she stated that she had had sex with him "a million times" during their year-long affair (Tr. 297). Officer Hughes asked appellant to be more realistic. Appellant said that they had sex between once a day and three or four times a day (Tr. 297). She stated, "My fire burns hotter than others." (Tr. 297). When Officer Hughes ran out of names of her know paramours, he asked her to be truthful with him, "was that all of [your] affairs?" (Tr. 299). She replied, "No, that wasn't truthful [but] that's as truthful as [I am] going to be" (Tr. 299.)

Concerning whether her husband knew of any affairs, Detective Woodson asked her, "So if you're not caught red-handed, you're not going to tell the

truth?" Appellant responded, "No, not unless I'm caught red-handed" (Tr. 299-300). Before the interview ended, appellant asked Officer Hughes if he would take her out to dinner before she went to prison (Tr. 300). Petitioner commented upon her values by saying, "I've got a different set of values" (Tr. 300). She referred to herself as cold-blooded (Tr. 300).

Appellant testified in her own defense. She indicated some mysterious intruder had raped her and killed her husband (Tr. 571-619).

This Court summarized the facts of the case as follows:

> In the early morning hours of February 18, 1984, defendant and her husband Bill returned to their Holden, Missouri, home after an evening of socializing with friends. Defendant testified that at some time after both she and Bill had fallen asleep she was awakened by a sound like thunder. She was grabbed by the hair and pulled from the bed by an unknown assailant who then tried to rape her. Defendant related that after the intruder left she heard her husband making gurgling noises but was unable to see him in the completely dark bedroom because the lights were not working. She stated that she got a flashlight and, after seeing blood on her husband, awakened the children and drove with them to a neighbor's home for help.

> Evidence at trial showed that the victim was shot with a .22 caliber repeater rifle which was normally kept unloaded in the Prewitts' bedroom closet behind a chest of drawers. Bullets were stored in a drawer and in defendant's jewelry box. The rifle was found three days later in the Prewitts' pond in 11 inches of water 15 feet from the bank. A footprint made by Patricia's boot was observed on the pond bank and, after the pond was drained, another footprint was found on the pond bottom near the rifle.
>
> Dr. James Bridgens, a forensic pathologist, testified that in his expert opinion William Prewitt was asleep immediately before he was shot twice in the head. The second shot severed the brain stem and caused instant death. Dr. Bridgens also testified that the angle of the second shot indicated the gun would have been held "almost on top" of anyone sleeping in the bed with the victim.
>
> Testimony was adduced as to defendant's numerous extramarital affairs. Two of her lovers testified that defendant had offered them money to kill her husband. A third testified that she told him she wished Bill were dead and had considered shooting him in his sleep.

State v. Prewitt, 714 S.W.2d 544, 545 (Mo.App.W.D. 1986). Appellant's conviction and sentence were affirmed on direct appeal. Appellant subsequently

filed a postconviction motion pursuant to Rule 29.15. The denial of this motion was also affirmed by this Court. *Prewitt v. State,* 781 S.W.2d 92 (Mo.App.W.D. 1989).

Appellant subsequently moved for a writ of habeas corpus pursuant to 28 U.S.C. §2254; that petition was denied. *Prewitt v. Goeke*, 1991 WL 220273 (C.C.W.D. Mo. 1991). Appellant appealed, and the Eighth Circuit affirmed the denial of habeas relief. *Prewitt v. Goeke*, 978 F.2d 1073 (8th Cir. 1992).

On November 27, 2017, appellant filed a motion for postconviction DNA testing (D20 p1). In the motion, appellant pled that DNA analysis was unavailable at the time of her trial (D20 p1). Specifically, appellant sought to have the following items tested: her pajama top and bottom; the telephone and cord from the master bedroom; the telephone and cord from the downstairs hallway; a serrated knife recovered from the yard, a knife found behind the cushion of the love seat in the family room; a paring knife; a brown towel, cut and pulled hair samples from the victim's head; and the pillow and pillow case from beneath the victim's head (D20 p2).[1] Appellant pled that DNA evidence would corroborate her account of an intruder who assaulted her and murdered

[1] Appellant does not explain whether "victim" refers to her deceased husband or to herself.

her husband, creating a reasonable probability that a jury would not have convicted her (D20 p22).

The state filed a response, noting that appellant had never indicated that the alleged assailant had ejaculated or left semen on her clothes (D27 p1-2). There was no evidence that the alleged assailant was ever in bed or had laid his head on the pillowcase (D27 p2). The murder weapon was owned by the Prewitts and was kept behind a chest of a drawers; the ammunition was kept in appellant's jewelry case (D27 p2).

The state asserted that even if DNA of other individuals were to be found on appellant's clothing, that would not have created a reasonable probability that she would not have been convicted (D27 p2). There was no testimony that the alleged assailant had ejaculated (D27 p2). Testing of the telephone cords would prove nothing as DNA could have come from multiple sources, including telephone repair persons or normal visitors to the home (D27 p3). None of the knives were identified as having any blood on them even though appellant claims that she was cut by the assailant's knife (D27 p3). Testing appellant's hair would prove nothing (D27 p3). The brown towel had no evidentiary significance (D27 p3). The prosecutor observed that there was substantial evidence of appellant's guilt and the outcome would not change with DNA testing (D27 p4).

A hearing was held on appellant's motion, after which the court took the matter under advisement (DNATr 1-27). The motion court ultimately denied appellant's motion for DNA testing, finding that there was not a reasonable probability that appellant would not have been convicted (D32 p6).

ARGUMENT

I.

The motion court did not clearly err in denying appellant's postconviction motion for DNA testing (In response to Points I and II).

Appellant contends that the motion court clearly erred in denying her postconviction motion for DNA testing (App.Br. 18). Appellant asserts that the court did not properly assess whether a reasonable probability existed that she would not have been convicted if exculpatory results were obtained and the motion court erroneously applied the standard for release under §547.037, as opposed to the standard to obtain testing under §547.035 (App.Br. 18).

A. Standard of review.

A motion for DNA testing, pursuant to §547.035, is a post-conviction motion, governed by the rules of civil procedure. § 547.035.1; *Weeks v. State*, 140 S.W.3d 39, 43-44 (Mo.banc 2004). Section 547.035 does not set out a standard for appellate review of the motion court's rulings on such motions. *Hudson v. State*, 190 S.W.3d 434, 437 (Mo.App.W.D. 2006). However, because Rule 29.15 and 24.035 set out the applicable standard of review for other post-conviction motions, it is appropriate to apply that standard to the review of the denial of a post-conviction motion for DNA testing under §547.035. *Id.* at 437-438.

Review of a denial of a post-conviction motion under Rules 29.15 and 24.035 is limited to a determination of whether the motion court's findings of

fact and conclusions of law were clearly erroneous. *Id.* at 438. Hence, review of a DNA motion is to determine whether the motion court's findings of fact and conclusions of law, in denying the appellant's motion, were clearly erroneous. *Id.* The motion court's findings and conclusions are clearly erroneous only if, after the review of the record, the appellate court is left with the definite and firm impression that a mistake has been made. *Id.*

B. Analysis.

The motion court did not clearly err in denying DNA testing. The motion court correctly found that there was not a reasonable probability that appellant would not have been convicted and correctly found that appellant was not entitled to relief.

As this Court found, there was overwhelming evidence of appellant's guilt. *State v. Prewitt,* 714 S.W.2d 544, 550 (Mo.App.W.D. 1986) (finding no prejudice due to the "plethora of evidence" against appellant). The victim was shot twice by a gun that was kept behind a chest of drawers in appellant's bedroom, and the bullets were kept in appellant's jewelry box. The gun was subsequently found in the pond outside of the house, and appellant's boot prints led to the gun in the pond (Tr. 387, 392). In addition, appellant had affairs and sought the help of her paramours in murdering her husband. *State v. Prewitt,* 714 S.W.2d 544, 545 (Mo.App.W.D. 1986).

Equally telling is the fact that appellant's version of what happened was not credible. Appellant claimed that the unknown perpetrator entered a dark room where two people were sleeping, cut the phone cords, searched for and found a rifle in a cluttered closet behind the dresser, loaded the rifle in the dark, shot Mr. Prewitt twice from different trajectories, pulled appellant off of the bed by her hair, and removed her clothing. Then, despite the fact that he had shot Mr. Prewitt in his sleep and threatened appellant with a knife, the perpetrator simply left the room because appellant was crying, rather than killing the only witness against him. Then the perpetrator took the gun to the pond, leaving no tracks anywhere. There were no tracks into the house. There were no signs of recent forced entry (Tr. 233, 248-249). Nothing was taken from the house (Tr. 317). The gunshots that killed Mr. Prewitt could not have been made in total darkness due to the precise aiming demonstrated (Tr. 475).

Then there were appellant's demonstrably false statements. She asserted that she heard her husband breathing after the two shots. This was not possible because he was shot through the brain stem which would have instantly stopped his breathing (Tr. 470-471). Appellant also repeatedly denied her affairs until confronted by the police (Tr. 296). Even the marks on her neck were shown to be a ruse as the state's forensic expert testified that they were self-inflicted and were not consistent with being caused by an attempted rapist (Tr. 476-477, 501).

Based on this evidence, the motion court found that there wasn't a reasonable probability of a different outcome had DNA testing been ordered. Appellant, however, argues that the jury was hung at one point and thus DNA evidence would have created a reasonable doubt (App.Br. 24). The motion court properly rejected this argument, noting that appellant could not possibly know what the jury would have done, and indeed, the record is silent as to why the jury was hung at one point. Appellant cannot rely upon a temporarily hung jury to establish that she was entitled to DNA testing.

Appellant contends that the court erred because it "erroneously" applied the standard for ordering release under §547.037 as opposed to the standard for ordering testing under §547.035 (App.Br. 19-20, 28-29).

The burden is on appellant to prove, by a preponderance of the evidence, the allegations in the motion. §547.035.6, RSMo. The trial court shall order appropriate testing if the court finds 1) a reasonable probability exists that the movant would not have been convicted if exculpatory results had been obtained through the requested DNA testing; and 2) that the movant is entitled to relief. §547.035.7.

If DNA testing demonstrates a person's innocence, the movant may file a motion for release. §547.037.1, RSMo. If the court finds that the DNA testing pursuant to §547.035 demonstrates the movant's innocence, the court shall order

the movant's release; otherwise "relief shall be denied the movant." §547.037.5, RSMo.

Appellant contends that the court erred because it "refused to weigh what the impact of exculpatory DNA results on the jury." (App.Br. 22). But appellant ignores the statutory language that the court need not order DNA testing unless it finds both that 1) a reasonable probability exists that the movant would not have been convicted if exculpatory results had been obtained through the requested DNA testing; and 2) *that the movant is entitled to relief*. §547.035.7 (emphasis added). A movant is not entitled to relief – that is, release – unless the evidence is exculpatory. There is no provision in the DNA statutes that provides for a new trial, and the motion court does not err in so finding. Nor did the motion court err in considering whether or not the evidence would be exculpatory.

Appellant argues, however, that the court erred in focusing on whether DNA testing could prove appellant's innocence (App.Br. 29). But there was nothing improper about the court examining whether the DNA testing could prove appellant's innocence, inasmuch as the DNA results must be exculpatory and the movant must therefore be entitled to relief. If DNA is exculpatory, it proves the movant's innocence. If it does not prove innocence, it is not exculpatory.

As it happens, the court expressly stated that it "cannot find that a reasonable probability exists that Ms. Prewitt would not have been convicted if exculpatory results had been obtained through DNA testing." (D29 p5). The court's findings establish that the court did not find that appellant had proven a reasonable likelihood that she would not have been convicted. And indeed, none of the proposed DNA testing would prove that she did not kill her husband.

Appellant relies on *Weeks v. State*, 140 S.W.3d 39, 50 (Mo.banc 2004), for the proposition that a movant "need not conclusively prove his innocence" in order to obtain DNA testing (App.Br. 31). While the motion court does make reference to proving innocence, it is clear from the totality of the motion court's findings that the motion court did not find a reasonable probability that appellant would not have been convicted as the motion court examined the strength of the state's case (D29 p3-4, 5-6) and the failure of DNA evidence to counter the state's case (D29 p4, 6).

Moreover, *Weeks* involved a case wherein DNA evidence was sought to determine whether the defendant was the source of intact sperm on the vaginal swab and on the victim's pants; in other words, the DNA evidence went directly to whether Weeks committed the crime or not and would either be exculpatory or inculpatory. But in appellant's case, the preponderance of the evidence does not establish that any proposed DNA findings would be exculpatory. While appellant opines that ejaculate could be found on appellant's pajamas (App.Br.

23), there was no evidence whatsoever that the alleged perpetrator ejaculated. There was no evidence tying any of the knives to the bedroom. There was no evidence tying the brown towel to the crime scene.

As for all of the items appellant seeks to have a tested, a particular problem is that appellant seeks to rely on the use of "touch DNA." Touch DNA analyzes skin cells left behind when an assailant touches victims, weapons or something else at a crime scene. http://campbelllawobserver.com/new-study-shows-that-touch-dna-may-implicate-the-innocent/, last accessed January 7, 2019. But given the age and the circumstances of this case, there is little basis to believe that any samples have not been contaminated. The National Criminal Justice References Service suggests the following precautions to prevent evidence contamination:

1. Wear gloves and change them often

2. Use disposable instruments or clean them thoroughly before and after handling each sample

3. Avoid touching the area where DNA may exist

4. Avoid talking, sneezing, and coughing over evidence

5. Avoid touching your face, nose, and mouth when collecting and packaging evidence

6. Air-dry evidence thoroughly before packaging

7. Put evidence into new paper bags.

8. Use different tools – tweezers, fingerprint brushes, swabs – at every scene.

The evidence in the present case was collected in 1984, at a time when DNA testing did not exist. There is no allegation that law enforcement took any steps to protect the evidence. The evidence could have been touched by numerous officers, family members, other people in the house, visitors, etc. Assuming *arguendo* that DNA could even be found on the evidence in question some 30 years later, the probative value of any such evidence is negligible at best. Appellant failed to plead or prove any facts showing that the evidence has been handled or stored in such a way as to protect it from contamination. As the prosecutor noted at the hearing, "Touch DNA could have come from anyone at any time prior to the murder, after the murder. And the fact that someone else's touch DNA is on that item shows nothing other than someone else has touched those items. So it's the State's belief that that would not add anything to the record that's already in this case." (DNATr. 14).

Because touch DNA would not demonstrate when a particular item was touched, it would not corroborate appellant's account and bolster her credibility, particularly where it would not explain how an unknown perpetrator came into the room in the dark, found a gun in the dark, loaded a gun in the dark, and shot the victim over appellant as she allegedly slept next to her husband.

In addition, appellant had affairs with other men and sought their help in killing her husband. Even if DNA demonstrated another person was present in the bedroom, this would not prove that the person wasn't an accomplice or that appellant had not taken part in the murder.

In sum, the motion court correctly determined that appellant was not entitled to DNA testing because appellant's allegations fail to establish a reasonable probability that appellant would not have been convicted if exculpatory results had been obtained through DNA testing. Appellant's claim is without merit and should be denied.

II.

The motion court did not err, plainly or otherwise, in relying on factual errors and failing to appear impartial (Responds to Point III).

Appellant argues that the court relied on factual errors and extrajudicial information, thus failing to appear impartial (App.Br. 20). Appellant observes that at the hearing, the motion court judge observed that he had attended portions of appellant's trial in 1985 (DNATr. 24). Appellant asserts that this was an "extrajudicial experience" and that the judge suggested that he did not find appellant credible, thereby suggesting that his impartiality was in question (App.Br. 32).

A. Relevant facts.

In the course of the DNA hearing, the judge said, "I remember this. I was a young judge when this case was going on. I heard some of the evidence." (DNATr. 24). The judge said that he recalled that appellant testified "that her sexual engine is hotter than most other people, or some words to that effect." (DNATr 24-25). Defense counsel asserted that appellant had not testified to that (DNATr. 24-25). The court again asserted that she did, but the prosecutor then said that it was the lead investigator who had testified that the appellant had said that (DNATr. 24-25). The court said, "Okay. That may be, but I heard that testimony and that – that's been remembered because that makes this case unique." (DNATr 25).

The trial record reflects that Kevin Hughes testified that he asked appellant about the number of times she had sex, and she said "at least once a day, sometimes three or four times a day." (Tr. 297). Hughes asked about the frequency, and she said, "My fire burns hotter than others." (Tr. 297). When appellant testified, she said that she couldn't imagine ever saying a statement like that (Tr. 615).

Appellant also asserts that the motion court was incorrect in finding that there could not have been seminal fluid on the pajama bottoms because it could have happened when she put them back on (App.Br. 35). Appellant also asserts that she testified that the alleged perpetrator was on top of her when he pulled her pajama bottoms and panties off (App.Br. 36; Tr. 624).

Finally, appellant argues that the judge incorrectly stated that she was awakened by the gunshots when she said that she thought it was thunder (App.Br. 37).

B. Analysis.

To begin, appellant cites to Rule 2-2.11(A) to suggest that the motion court judge was not impartial. Appellant did not assert, in his Point Relied On, that the court erred in failing to recuse. Claims of error must be raised in a Point Relied On, and insufficient points preserve nothing for this court to review. *Hall v. Missouri Bd. Of Probation and Parole,* 10 S.W.3d 540, 544 (Mo.App.W.D.

1999). Because appellant's claim is not raised, this Court may, within it s discretion, decline to address the claim. *Id.* at 545.

In any event, the record does not reflect a basis for the motion court's recusal, which appellant never sought. It is presumed that a judge acts with honesty and integrity and will not undertake to preside in a trial in which the judge cannot be impartial. *Smulls v. State*, 10 S.W.3d 497, 499 (Mo.banc 2000). A disqualifying bias or prejudice is one that has an extrajudicial source and results in an opinion on the merits on some basis other than what the judge learned from the judge's participation in a case. In cases requiring recusal, the common thread is either a fact from which prejudgment of some evidentiary issue in the case by the judge may be inferred or facts indicating the judge considered some evidence properly in the case for an illegitimate purpose. *Id.*

In the present case, the trial judge recalled evidence from the trial which occurred over 30 years ago. While he did not accurately recall whether it was appellant or another witness who testified to appellant's out-of-court statement, he remembered the testimony. This was not extrajudicial inasmuch as the testimony in question was in the record and was properly before the motion court in deciding the DNA case. In its findings, the motion court indicated that it had read the court files and the trial transcript, and thus any error in the court's recollection was of no consequence. Moreover, there is no indication

whatsoever in the findings of fact and conclusions of law that the testimony regarding appellant's sexual proclivity affected the motion court's ruling.

Appellant then faults the motion court for what appellant asserts are several factual errors in its findings and conclusions. An appellate court will affirm a motion court's judgment if it reached the right result, even if for the wrong reason. *Huston v. State*, 532 S.W.3d 218, 221 (Mo.App.W.D. 2017). In the present case, any errors by the motion court were not material.

To begin, appellant argues that the motion court was wrong to determine that an alleged stain on appellant's pajamas could not have come from the perpetrator (App.Br. 35). Respondent is not aware of any testimony suggesting that the alleged perpetrator ejaculated. Appellant testified that the perpetrator was fumbling with his belt, but he did not rape her (Tr. 603). When asked what the perpetrator allegedly did, appellant said that he "touched" her (Tr. 604). Appellant said that he got up and left because she was crying (Tr. 604-605). Given appellant's testimony, it was reasonable for the motion court to determine that DNA testing on an unspecified, 30-year-old stain would not have been exculpatory.

Appellant faults the motion court because the court wrote that appellant testified that the shots were what woke her up (App.Br. 37). Appellant said she awoke to what she thought was thunder (App.Br. 37). The evidence showed that appellant told the police she was awakened by "what she thought were two claps

of thunder." (Tr. 279). It is a reasonable inference that the "two claps of thunder" were the two gunshots; indeed, it would be difficult to imagine that appellant was referring to anything else inasmuch as she was allegedly sleeping in bed next to her husband when the shots occurred. Appellant never testified that she heard gunshots after she was awakened. It was reasonable for the court to state that appellant said she was awakened by the gunshots.

Appellant argues that these alleged errors demonstrate that the motion court relied on its own personal recollection rather than the evidence (App.Br. 37). On the contrary, in its findings, the motion court expressly stated the record it reviewed, including the transcript and the legal file. This was a substantial transcript, over 700 pages, and any error on the part of the motion court regarding two facts was immaterial. Any misrecollection on the part of the motion court at the hearing is of no consequence as it was corrected and is not reflected in any way in the court's findings and conclusions.

Appellant also asserts that the circuit court appeared biased because, in its findings, it expressed its opinion that appellant was not truthful (App.Br. 37-38). That is precisely what a court is entitled to do in making its ruling, and in this case, the court did so after reviewing the entire record. The fact that the motion court ruled against appellant is not an indication of bias. *State v. McDaniel*, 236 S.W.3d 127 (Mo.App.S.D. 2007).

CONCLUSION

In view of the foregoing, respondent submits that the denial of appellant's DNA motion be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify:

That the attached brief complies with the limitations contained in Missouri Supreme Court Rule 84.06 and contains 4,887 words, excluding the cover, certification and appendix, as determined by Microsoft Word 2007 software.

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